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April 4, 2000

VIA HAND DELIVERY

Magalie R. Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: QUALCOMM Incorporated
Ex Parte Notification: WT Docket No. 99-168, DA 00-219

Dear Ms. Salas:

This is in response to a March 24, 2000 *ex parte* communication submitted on behalf of Motorola, Inc. ("Motorola"), in connection with QUALCOMM Incorporated's ("QUALCOMM") Petition for Declaratory Ruling seeking award of the 700 MHz Block D 20 MHz license in Economic Area Grouping 3.[1] Motorola's letter supports the award of transferable bidding credits to QUALCOMM, in lieu of "suitable spectrum" as contemplated by the mandate of the District of Columbia Circuit Court of Appeals.[2] As Motorola points out, "grant of such a bidding credit would facilitate the goal of harnessing market forces to determine the licensee for many commercial spectrum allocations."[3]

On a number of occasions since the D.C. Circuit issued its mandate in *QUALCOMM v. FCC*, QUALCOMM has indicated its willingness to consider a transferable bidding credit/spectrum voucher in lieu of an outright award of suitable spectrum. This would allow QUALCOMM (or its transferee) to participate in an auction for spectrum appropriate for pioneering technology, and would provide recognition for QUALCOMM's pioneering achievement.

[1] *See* QUALCOMM Incorporated, *Petition for Declaratory Ruling*, January 28, 2000 ("Petition").
[2] *See QUALCOMM Incorporated v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999).
[3] Letter from Richard C. Barth for Motorola, Inc. to Magalie R. Salas, Secretary, Federal Communications Commission, March 24, 2000 ("Motorola Letter").

QUALCOMM is pleased to note Motorola's support for the spectrum voucher proposal. However, there are some details of the proposal discussed in Motorola's letter which require correction.

Use of HDR Technology

Motorola is wrong in suggesting that use of QUALCOMM's High Data Rate technology would be prohibited. Motorola is referring to a condition, placed on other pioneers, that they make "substantial use" of the technology for which they were awarded the preference. Strictly speaking, however, since the award of the preference to QUALCOMM does not specify any technology, the "substantial use" requirement could not apply.[4]

Even if it did apply, use of HDR technology would be permitted. Motorola is probably unaware that HDR is a CDMA-based product, making use of the pioneering breakthroughs in Code Division Multiple Access for which QUALCOMM first sought a preference in 1992. HDR is merely a new application of QUALCOMM's pioneering work. It is entirely consistent with the pioneer's preference program to look toward the next generation of technology, rather than requiring QUALCOMM to deploy CDMA-based voice technology in use for seven years.[5]

Amount of Spectrum Voucher

An obvious issue, and another one on which Motorola needs correcting, is the question of the value of the spectrum voucher. QUALCOMM has indicated that it is not interested in a spectrum voucher of less than $150 million. This is based on the average value of the preference to each of the three PCS preference winners, *at the time of the auction*. It does not include the value of the installment payment plan, the competitive advantage of a headstart in service or any other "damages" that Motorola finds objectionable

Moreover, this number was provided to the D.C. Circuit Court of Appeals in QUALCOMM's Brief in the *QUALCOMM v. FCC* case. Page 30 of that Brief (attached) contains a chart showing the price paid by the preference licensee and the comparable auction licensee. The average difference is $148,734,000. That is the only number upon which the D.C. Circuit could have relied when it ordered the Commission to award "suitable" spectrum.

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4 *See Amendment of the Commission's Rules to Establish New Personal Communications Service*, FCC 99-200, August 9, 1999 (attached).

5 QUALCOMM also believes this interpretation of the "substantial use" condition is consistent with the Commission's "relaxed" approach to the condition found in the Omnipoint/VoiceStream transfer of control

Time Limitations

Motorola proposes that the spectrum voucher must be used within three years. QUALCOMM does not object to placing a limit on the time within which the voucher must be used. Indeed, as a practical matter, QUALCOMM is very likely to use the voucher sooner rather than later. Nevertheless, we believe the time limit should be sufficiently flexible to allow for participation in any auction presently scheduled to take place within a given period from the award of the voucher.

Availability of C Block

Motorola believes that if the spectrum voucher alternative cannot be implemented, the next viable alternative would be award of C or F Block licenses. Motorola is mistaken as to the availability of C or F Block licenses. As the Chairman recently recognized, the majority of these licenses are the subject of litigation before various courts, "which will decide the status of [these] licenses under applicable law."[6] Consequently, these licenses are not presently available to be awarded to QUALCOMM, free of legal entanglement.

With these corrections, QUALCOMM is pleased to have the support of Motorola for the spectrum voucher/bidding credit proposal.

Respectfully submitted,

Veronica M. Ahern

Veronica M. Ahern smg

cc: Richard C. Barth, VP and Director
Telecommunications Strategy and Regulation
Motorola

James Schlichting, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission

James Carr
Office of the General Counsel
Federal Communications Commission

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6 Letter of Chairman William Kennard, Federal Communications Commission, to Rep. Bart Gordon, U.S. House of Representatives, March 23, 2000.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the	)	GEN Docket No. 90-314
Commission's Rules	)	PP-68
to Establish New	)	
Personal Communications Services	)	

ORDER

Adopted: August 4, 1999; Released: August 9, 1999

By the Commission:

1. On July 23, 1999, the United States Court of Appeals for the District of Columbia Circuit ordered the Commission to grant QUALCOMM Incorporated (QUALCOMM) a pioneer's preference "forthwith."[1] The Commission had previously dismissed QUALCOMM's request for a pioneer's preference in the 2 GHz broadband Personal Communications Services;[2] however, QUALCOMM appealed that dismissal, and the Court granted QUALCOMM's petition for review. The Commission, in compliance with the Court's decision, hereby grants QUALCOMM a pioneer's preference. In accordance with the Court's instructions, the Commission plans to act promptly to identify suitable frequency spectrum for an award of a license to QUALCOMM.

2. Accordingly, IT IS ORDERED that a pioneer's preference is hereby GRANTED to QUALCOMM Incorporated in accordance with the Court's decision. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[1] QUALCOMM Incorporated v Federal Communications Commission, D.C. Cir. No. 98-1246.

[2] *See* Review of the Pioneer's Preference Rules, ET Docket No. 93-266, *Order*, 12 FCC Rcd 14006 (1997); *recon. denied*, *Memorandum Opinion and Order*, 13 FCC Rcd 11485 (1998).

The following table is a comparison of the amounts paid (in thousands) by the three preference winners and their respective market competitors, who secured their licenses at auction:

MARKET	PREFERENCE LICENSEE	AUCTION LICENSEE	DISCOUNT
New York City (Omnipoint)	$347,518	$442,712	21%
Los Angeles (Cox)	251,919	493,500	48%
Washington, D.C. (APC)	102,344	211,771	51%

Source: FCC Report to Congress on Spectrum Auctions, supra, at C-3, C-5 (J.A. 715, 717).

The average value of the preference, to each winner, is $148,734,000, not including the value of the installment payment plan or the competitive advantage of a headstart in service.

B. QUALCOMM Has A Legitimate Claim Of Entitlement

To establish a protected property interest in a pioneer's preference benefit, QUALCOMM must show a "legitimate claim of entitlement to it, " more than a mere "unilateral expectation." *Roth,* 408 U.S. at 577. QUALCOMM has a legitimate claim of entitlement to a pioneer's preference benefit founded in the Commission's Rules, the *Freeman* mandate, and understandings arising from the Commission's consistent administration of the pioneer's preference program.[44]

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[44] The fact that QUALCOMM remains an applicant rather than a recipient of a government benefit does not diminish the validity of QUALCOMM's due process claim: The federal courts (including the D.C. Circuit) have long accorded due process rights to applicants for governmental benefits or privileges. *See, e.g., Mallette v. Arlington County Employees' Supplemental Retirement Sys. II,* 91 F.3d 630, 637-638 (4th Cir. 1996); *National Ass'n of Radiation Survivors v. Derwinski,* 994 F.2d 583, 588 n.7 (9th Cir. 1993); *Holbrook v. Pitt,* 643 F.2d 1261, 1278 n.35 (7th Cir. 1981); *Kelly v. R.R. Retirement Bd.,* 625 F.2d 486, 489-490 (3d Cir. 1980); *Raper v. Lucey,* 488 F.2d 748, 751-752

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